NO. 17-0175

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

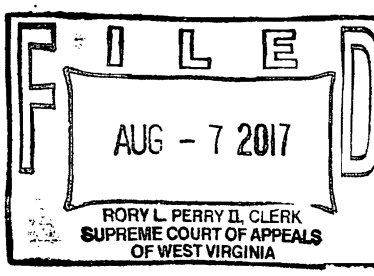
PAT REED, COMMISSIONER OF
THE WEST VIRGINIA DIVISION
OF MOTOR VEHICLES,

Petitioner,

v.

JOSEPH D. POMPEO,

Respondent.



PETITIONER'S REPLY BRIEF

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MISCELLANEOUS

Now comes the Petitioner, Pat Reed, Commissioner of the West Virginia Division of Motor Vehicles ("DMV"), and pursuant to Rule 10(g) of the Revised Rules of Appellate Procedure hereby submits her reply to the *Brief of Respondent, Joseph D. Pompeo.* The Commissioner stands on her initial brief for all points not further addressed herein.

ARGUMENT

I. THE CIRCUIT COURT EXCEEDED ITS AUTHORITY BY SUBSTITUTING ITS JUDGMENT FOR THE OAH'S FINDINGS AND BY EXCLUDING EVIDENCE WHICH SHOULD BE ADMITTED AND GIVEN THE WEIGHT IT DESERVES.

The circuit court's *Final Order* is a reiteration of the Respondent's brief to the circuit court, not a review of the record as a whole or of purported error in the OAH's *Final Order*. At the conclusion of the circuit court's *Final Order*, the court refers to, alternatingly, "the Commissioner" and "the ACHE" (a charming acronym for the Acting Chief Hearing Examiner of the OAH, who issued the OAH's *Final Order*), but does not assign error to the OAH's order. Review of the OAH's *Final Order* should have been made under the judicial review provisions of the Administrative Procedures Act ("APA"). *Groves v. Cicchirillo,* 694 S.E.2d 639 (W. Va. 2010) (per curiam). The APA's judicial review section, W. Va. Code § 29A-5-4, pertinently provides:

> (g) The court may affirm the order or decision of the agency or remand the case for further proceedings. It shall reverse, vacate or modify the order or decision of the agency if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions, decisions or order are:
>
> (1) In violation of constitutional or statutory provisions; or
>
> (2) In excess of the statutory authority or jurisdiction of the agency; or
>
> (3) Made upon unlawful procedures; or

(4) Affected by other error of law; or

(5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or

(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

In its *Final Order*, the circuit court simply disagreed with the findings of the OAH, rather than using an appropriate standard of review. "The 'clearly wrong' and the 'arbitrary and capricious' standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis." Syl. Pt. 3, *In re Queen,* 196 W. Va. 442, 473 S.E.2d 483 (1996). Likewise, "deference . . . is the hallmark of abuse-of-discretion review." *General Elec. Co. v. Joiner,* 522 U.S. 136 (1997). Additionally, a court can only interfere with a hearing examiner's findings of fact when such findings are clearly wrong. *Modi v. W. Va. Bd. of Med.,* 195 W. Va. 230, 239, 465 S.E.2d 230 (1995). "[T]his standard precludes a reviewing court from reversing a finding of the trier of fact simply because the reviewing court would have decided the case differently." *Brown v. Gobble,* 196 W. Va. 559, 565, 474 S.E.2d 489, 495 (1996). In other words, an appellate court may only conclude a fact is clearly wrong when it strikes the court as "wrong with the 'force of a five-week-old, unrefrigerated dead fish.'" *Id.* at 563, 474 S.E.2d at 493 (quoting *United States v. Markling,* 7 F.3d 1309, 1319 (7th Cir.1993)). In short, "credibility determinations by the finder of fact in an administrative proceeding are 'binding unless patently without basis in the record.'" *Webb v. West Virginia Bd. of Med.*, 212 W. Va. 149, 156, 569 S.E.2d 225, 232 (2002) (quoting *Martin v. Randolph County Bd. of Ed.,* 195 W. Va. 297, 304, 465 S.E.2d 399, 406 (1995)).

Indeed, this is consistent with understanding the differences between burdens of proof and

standards of review, a necessary understanding for an appellate court. *Noble v. West Virginia DMV,* 223 W. Va. 818, 821, 679 S.E.2d 650, 653 (2009) (per curiam) (quoting *West Virginia Board of Med. v. Shafer,* 207 W. Va. 636, 639, 535 S.E.2d 480,483 (2000) (Davis, J., dissenting)) ("'In administrative proceedings such as the one at bar, the circuit court is sitting in the capacity of an appellate court.'").

Standards of proof govern the factfinder. "[T]he factfinder must evaluate the raw evidence, finding it to be sufficiently reliable and sufficiently probative to demonstrate the truth of the asserted proposition with the requisite degree of certainty." *Concrete Pipe and Prod. v. Construction Laborers Pension Trust*,508 U.S. 602, 622 (1993). Standards of review "describe, not a degree of certainty that some fact has been proven in the first instance, but a degree of certainty that a factfinder in the first instance made a mistake in concluding that a fact had been proven under the applicable standard of proof. They are . . . normally applied by reviewing courts to determinations of fact made at trial by courts that have made those determinations in an adjudicatory capacity." *Id.* at 622-23. *See also Turner v. Jackson*, 417 S.E.2d 881, 887 n.5 (Va. Ct. App. 1992) (citation omitted) ("The term 'burden of proof' refers to the sufficiency of evidence required to meet a proponent's burden of producing evidence and burden of persuasion. The term 'standard of review,' on the other hand, refers to the degree of deference an appellate court gives a determination by an agency or lower court.").[1]

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[1]There is also a scope of review.

> "Scope of review" and "standard of review" are often--albeit erroneously--used interchangeably. The two terms carry distinct meanings and should not be substituted for one another. "Scope of review" refers to "the confines within which an appellate court must conduct its examination." In other words, it refers to the *matters* (or "what") the appellate court is permitted to examine. In contrast, "standard of review"

Further, under whole record review, a court "will not reweigh the evidence or independently evaluate evidentiary conflicts[,]" *Phoenix Roofing, Inc. v. Dole,* 874 F.2d 1027, 1029 (5th Cir. 1989); S*ee also Terry v. Astrue,* 580 F.3d 471, 475 (7th Cir. 2009)("We view the record as a whole but do not reweigh the evidence or substitute our judgment for that of the ALJ."). It is "[t]he trier of fact and not the reviewing court must resolve conflicts in the evidence," *Matney on Behalf of Matney v. Sullivan,* 981 F.2d 1016, 1019 (9th Cir. 1992), and the fact finder is entitled to believe all, some, or none of a witness's testimony. *Harper v. Commonwealth,* 642 S.E.2d 779, 782 (Va. Ct. App. 2007); *Goodman v. Commonwealth,* 558 S.E.2d 555, 561 (Va. Ct. App. 2002). "[I]f the evidence can support either outcome, the court may not substitute its judgment for that of the ALJ[,]" *Matney on Behalf of Matney v. Sullivan,* 981 F.2d 1016, 1019 (9th Cir. 1992),"even if it concludes that a preponderance of the evidence goes against the . . . decision." *Dalton v. Secretary of Health and*

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refers to the *manner* in which (or "how") that examination is conducted.

Morrison v. Commonwealth, 646 A.2d 565, 570 (Pa. 1994) (citation omitted).

Thus, there are four issues, two at trial and two on appeal:

(1) Burden of Proof–allocates who must ultimately convince the trier of fact that they are right;

(2) Standard of Proof–establishes what quantum or level of proof must the party with the burden of proof bring forward to convince the trier of fact to find for them?

(3) Scope of review-what are the things a reviewing court are allowed to review;

(4) Standard of review–how deferential must the reviewing court be to the decisions of the lower court the reviewing court is allowed to consider under the scope of review.

In other words, the Commissioner has the burden to prove by a preponderance of the evidence standard that the driver was in violation of the drunk driving laws. A reviewing court's scope of review of the administrative determination is set forth under West Virginia Code § 29A-5-4(g), with the court's standard of review of those issues ranging from highly deferential (e.g., findings of fact, arbitrary and capricious, and abuse of discretion) to plenary (review for violation of law), based on, *inter alia*, explicit legislative and constitutional allocation of responsibilities, competing institutional competencies, and practical limitations. *See, e.g., State ex rel. Cooper v. Caperton,* 196 W. Va. 208, 214, 470 S.E.2d 162, 168 (1996); *Salve Regina College v. Russell,* 499 U.S. 225, 231-33 (1991).

Human Services, 1990 WL 98035, 5 (6th Cir). "If the ultimate findings and conclusions could reasonably have been drawn from the primary evidentiary facts . . . a reviewing court, may not 'displace the ... choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo.*" *Thornton v. U.S. Dep't of Agriculture*, 715 F.2d 1508, 1510 (11th Cir. 1983) (quoting *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 488 (1951).

The circuit court did not make any real findings that the OAH committed error in weighing the facts or the applying the law thereto. There is nominal reference to "the Commissioner" and "the ACHE" (A.R. 17-19) committing error because the OAH's conclusions in its *Final Order* do not conform to the Respondent's version of events; however, there is sufficient evidence to affirm the OAH's order. While whole record review considers what evidence is in the record to detract from the evidence that supports the agency's conclusion, such a review does not mean that the court can use evidence that the agency has found uncredible or less persuasive as a means to detract from evidence the agency has found credible or more persuasive. Whole record review takes place against a backdrop where credibility decision and weighing of the evidence has already occurred. It is not the circuit court's role to reweigh or rejudge the determinations of the OAH.

Moreover, the circuit court excluded evidence of the field sobriety tests rather than giving the tests, already admitted into evidence, the weight they deserved. The DUI Information Sheet, which showed that the Respondent failed the horizontal gaze nystagmus, walk-and-turn and one-leg stand tests (A.R. at 29-30), was admitted into evidence pursuant to W. Va. Code § 29A-5-2(b). "We acknowledge that the fact that the DUI Information Sheet was admissible 'does not preclude [its] contents ... from being challenged during the hearing. Rather, the admission of such a document into evidence merely creates a rebuttable presumption as to its accuracy.' *Crouch* [*v. W. Virginia Div. of Motor Vehicles*, 219 W. Va. 70, 631 S.E.2d 628 (2006)], 219 W. Va. at 76 n. 12, 631 S.E.2d at 634

n. 12." *Dale v. Reed*, No. 13-0429, 2014 WL 1407353, at *3 (W. Va. Apr. 10, 2014)(memorandum decision).

The circuit court committed cardinal legal error and should be reversed.

II. THE CIRCUIT COURT ERRED IN EXCLUDING THE EVIDENCE ADDUCED BY THE FIELD SOBRIETY TESTS.

The circuit court erred in excluding the evidence adduced during the field sobriety tests. Fundamental administrative law dictates that this evidence is admitted and given the weight it deserves.

The Investigating Officer's uncertainty with regard to some details of the administration of the tests is not a confession of error in administering the tests. Moreover, the Respondent did not testify that the Investigating Officer failed to make the correct number of sweeps while administering the horizontal gaze nystagmus ("HGN") test or that the Investigating Officer failed to confirm whether the Respondent understood the instructions for the walk-and-turn ("WAT") and one-leg stand ("OLS") tests.

The circuit court excluded the HGN test because "Patrolman Prager testified, he did not observe the requisite number of sweeps or holds in passing the stimulus before Pompeo's eyes." A.R. 15. This is incorrect. The DUI Information Sheet reflects that Patrolman Prager did a medical assessment and during testing observed lack of smooth pursuit in both eyes as well as distinct and sustained nystagmus at maximum deviation. A.R. 29. This constitutes four clues of impairment, which is the decision point for the test.

The National Highway Traffic Safety Administration ("NHTSA")[2] manual, on which West Virginia police officers, including the Investigating Officer in this case, are trained at the West Virginia State Police Academy to administer field sobriety tests, provides that when testing for

[2]HS 178 R8/06, 2006 Participant Manual for the National Highway Traffic Safety Administration (NHTSA), DWI Detection and Standardized Field Sobriety Testing (SFST) Course.

smooth pursuit, an officer should check the left then the right eye by moving the stimulus smoothly to bring the suspect's eye as far to the side as it can go. The manual provides, "Repeat the procedure." NHTSA manual at VIII-7. When testing for distinct and sustained nystagmus at maximum deviation, an officer should check the left then the right eye by moving the stimulus smoothly to bring the suspect's eye as far to the side as it can go. The manual provides, "Repeat the procedure." NHTSA manual at VIII-7.

The Investigating Officer's testimony does not reveal any flaws in the way the HGN test was administered. The Investigating Officer testified, "at least a couple of times." A.R. 230. When then asked, "And can we agree also that you didn't give a test for each one of those clues, and you didn't repeat the procedure for each one of those subparts?" the Investigating Officer replied, "I had gone both directions at least a couple of times." A.R. at 232.

The NHTSA manual[3] states that on the test for smooth pursuit, "Movement of the stimulus should take approximately two seconds out and two seconds back on each eye." NHTSA manual at VIII-7. For the test for distinct and sustained nystagmus at maximum deviation, the manual provides, "move the stimulus all the way across the suspect's face to check the right eye holding that position for a minimum of four seconds." Counsel for the Respondent asked the Investigating Officer, "And if we aggregate all the seconds involved in those subpart, we're talking about 68 seconds." A.R. 231. Counsel elicited the response, "When I was doing the test I was not counting." (A.R. 231), clearly responding to whether he was counting the seconds.

Whereupon, although the Investigating Officer had twice testified that he performed the tests "at least a couple of times," counsel asked, "Will you agree that because you weren't counting the numbers of sweeps and holds for the HGN test, that you deviated from this standard?" A.R. 233.The

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[3]Counsel for the Respondent repeatedly refers to this standardized manual, created by a federal agency, as "the academy's language" (A.R. 232) and "the academy's rule." A.R. 234.

Investigating Officer replied, "Okay." This question distorts the Investigating Officer's testimony: the Investigating Officer clearly did count the number of sweeps and holds, as evidenced by the fact that he testified twice that he went both directions at least a couple of times. As set forth above, two times is the NHTSA standard. The Investigating Officer conflated the counting question regarding the number of seconds and the number of sweeps and passes.

Answering what he surely thought was a hypothetical question, "Will you agree since there was a deviation from the standard, allegedly the test results is compromised?" the Investigating Officer responded, "Correct." A.R. 233. The Investigating Officer valiantly attempted to stave off any admission that he had performed the test incorrectly and being forced to make legal conclusions about the evidence. Answering the hypothetical question, "If the validity of the test result is compromised, wouldn't it be fair not to count the fail result of the HGN test against Mr. Pompeo?" the Investigating Officer answered "Possibly." A.R. 233.

The circuit court's finding that "...the HGN was administered improperly, because, as Patrolman Prager testified, he did not observe the requisite number of sweeps or holds in passing the stimulus before Pompeo's eyes" (A.R.15) is factually and legally unsustainable. The Investigating Officer made the correct number of sweeps and holds. There is no requirement that he count the number of seconds he took to do so. The Investigating Officer's opinion about the weight of the evidence has no relevance to this proceeding.

The circuit court also improperly excluded the evidence from the one-leg stand and walk-and-turn tests. Regarding both tests, the circuit court excluded the evidence on unsubstantiated averments that the Investigating Officer failed to ascertain whether the Respondent understood the instructions. A.R. 15-16. Respondent's counsel asked the Investigating Officer if he asked Respondent whether he understood the instructions. The Investigating Officer responded, "I typically do ask them if they understand it before they perform it," "Well, I'm saying it now," "I typically do. I don't know

specifically with Mr. Pompeo. But like I said, I typically do," and "More than likely I did. I don't recall exactly." A.R. 243-44. Importantly, the Respondent neither showed that he did not understand the directions nor refuted that he was not asked whether he understood.

Apparently the circuit court's finding is based on a response to a hypothetical question. Whereas in the immediately preceding colloquy the Investigating Officer refused to admit that he failed to ask the Respondent if he understood, Respondent's counsel asked, "Can we agree that if you did not pose to him the question, do you understand under either of those on how to take the test, that the test would not have been administered in the proper manner?" the Investigating Officer responded, "If I did not ask him if he did not properly understand the test?" Counsel: "Yes." Investigating Officer: "Correct." A.R. 244. This is not evidence that the Investigating Officer failed to ask the Respondent if he understood. The question is preceded by "if." The Investigating Officer responded to a hypothetical question, and the circuit court took it as fact.

CONCLUSION

For the above reasons and those set forth in the *Petitioner's Brief*, this Court should reverse the Final Order of the circuit court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Janet James, Assistant Attorney General, do hereby certify that a true and exact copy of the foregoing *Petitioner's Reply Brief* was served upon the following by depositing true copies thereof, postage prepaid, in the regular course of the United States mail, this 7th day of August, 2017, addressed as follows:

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